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# RESISTING THE GRAND COALITION IN FAVOR OF THE STATUS QUO BY GIVING FULL SCOPE TO THE LIBERTAS ECCLESIAE

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RESISTING THE GRAND COALITION IN FAVOR OF THE STATUS QUO  
BY GIVING FULL SCOPE TO THE *LIBERTAS ECCLESIAE*

Patrick McKinley Brennan<sup>1</sup>

I.

“Religious freedom” -- there is a lot of talk about it in the United States today. Almost everyone wants to be on the side of it, of course, but a moment’s reflection reveals that neither term, “religious” or “freedom,” let alone the phrase, is univocal. The dominant discourse is as ambiguous as it is plentiful. Any potentially promising analysis of claims on behalf of “religious freedom” must start, therefore, by disambiguating the terms and clarifying meanings. Only then can we begin to establish any normative case for “religious freedom” and for the metes and bounds of its legal protection. Only then, moreover, can we make way for something we hear entirely too little about, the freedom of the Church, *libertas Ecclesiae* -- indeed, more to the point I intend to address, for the *rights* of the Church herself, the mystical

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<sup>1</sup> John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School. I am grateful to Fr. Joseph Koterski, S.J., and to the other members of the Board of the Fellowship of Catholic Scholars for the invitation to speak at the Fellowship’s 2013 Convention. I thank the many members of the audience who offered encouragement and critical insight. Early drafts of some parts of this paper were presented in a lecture I gave at the thirty-ninth annual Lonergan Workshop at Boston College in June 2012, and I thank Fred and Sue Lawrence for the invitation to deliver the lecture and for their hospitality on the occasion of my return to B.C.

body of Christ. The right of Christ's mystical body precedes, surpasses, and, in fact justifies any possible "right" to "religious freedom," or so I shall contend.<sup>2</sup>

It is a familiar fact that much of the recent rhetorical flourish in favor of "religious freedom" has come from defensive Catholics contending that they are under attack by their own national government. This is the stuff of *New York Times* headlines and nightly news. It is the stuff, more specifically, of unprecedented regulation by the U.S. Department of Health and Human Services (HHS) that would require the Catholic Church, among others, to purchase and provide her workers with contraception, sterilization, and abortifacients. It is, in turn, the stuff of denunciatory statements by the United States Conference of Catholic Bishops and a number of local Ordinaries, of paeans to "our most basic freedom" by the Bishops, of not-quite-responsive equivocations and entrenchment on the part of the White House, of the filing of litigation briefs and responses, of "fortnights for freedom," and so on and on and on.

Lost in the familiar, dulling, and even debasing wash-rinse-repeat is the sheer perversity of the fact that Catholics are now asked to believe that it counts as a good day when Catholics (and others) succeed in convincing legislators, judges, or other

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<sup>2</sup> Advocates of "religious freedom" gain social traction from the illusion that a regime that ostensibly respects "religious freedom" can avoid prickly and divisive questions concerning the truth of claims made in the name of religion. As Paul Horwitz observes, however, "[t]here is simply no escaping the question of religious truth." Paul Horwitz, *The Agnostic State: Law, Religion, and the Constitution* (New York: Oxford University Press, 2011), 160. The liberalism with which we are saturated is tolerant of religion only within the bounds allowed by liberalism itself, not beyond, which is why, as Kenneth Craycraft concludes, "[t]here is no such thing as religious freedom, and the reason that such an assertion sounds so shocking is that we have been completely formed by the American myth." Kenneth R. Craycraft, Jr., *The American Myth of Religious Freedom* (Dallas: Spence Publishing Co., 1999), 164.

government officials to make an *exception* to laws of general applicability on their behalf. Is it really enough for Catholics to be able to keep the faith thanks only to “accommodation?” And, to put a different question, one that almost no one seems to care to ask: what about the fate of the non-Catholics who lead their lives according to the law to which the Catholics have won an exception? The status quo is fraught with legally sanctioned or required conduct that is immoral. It is *concessum* that many or even most of those committing that conduct do not recognize its immorality, but, whatever else Catholics are, they are not moral relativists. The moral law was promulgated universally, not parochially.

The particular matter at hand, the HHS contraceptive mandate, remains a work in progress or, more likely, as only time will tell, in regress. Some Catholic bishops have stated that they will close Catholic hospitals, schools, orphanages, social service providers, and the like, rather than comply with a government command that violates the moral law as taught by the Church. For purposes of the present analysis, I will simply stipulate, rather than argue, a point that some dispute: despite some cosmetic and accounting changes introduced into the final rule adopted by the HHS after an epic administrative rulemaking process, the rule still requires Catholic associations – that is, the pluriform social organs of the Church – to act in such a way as to violate certain absolute moral norms. On that stipulation, the situation is grave, the future ominous, for the Church.

Some Catholics and others express shock at the government’s action and, moreover, at many people’s approval of and enthusiasm for it. For my part, though, none of this comes as much of a surprise, and the reasons for my lack of surprise are

a large part of what I wish to explore here. The problem is that most of the conversation misses the (one) truly important point.

Before digging down into the weeds, however, I would like to begin by highlighting and juxtaposing two Catholic doctrines -- the first because opponents are wont to ignore, downplay, or distort it, the second because it is, I will argue, the too-little-appreciated way out of the cul-de-sac that is "religious liberty." It is a destructive compulsion to try to describe as or convert all good things into "liberties," and my principal thesis here is that, whatever the case about "religious liberty" or "religious freedom" (I use the two terms interchangeably throughout), Catholics -- and others, of course -- are first called to make way for the Church.<sup>3</sup> In a world simultaneously organized and disorganized according to the tenets of liberalism and individualism, there is no more urgent task for Catholics than to recover the implications of the Church's being a perfect society, of honoring the rights of the mystical body of Christ, that is, of Christ-continued-in-the-world.

## II.

The first doctrine to be highlighted is that coercion must never be used to force the unbaptized to "believe" what Christians believe or to "do" what Christians do. The Catholic Church is unequivocally and unalterably opposed to compelling

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<sup>3</sup> Some distinguished scholars just plain drain the religion right out of "religious liberty" by reducing it to liberty *simpliciter*. See, e.g., Douglas Laycock, "Religious Liberty as Liberty," 7 *J. Contemp. Legal Issues* 313 (1996).

people to enter the Church. In the words of Second Vatican Council's Declaration on Religious Liberty, *Dignitatis Humanae*: "It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his own will. This doctrine is contained in the word of God and it was constantly proclaimed by the Fathers of the Church. The act of faith is of its very nature a free act."<sup>4</sup> In this the Council reiterates an enduring theological truth of high importance, even if we must admit that well-meaning souls acting in the name of the Church have sometimes zealously violated it.

Second, while incorporation into the Church must be voluntary, incorporation into the Church is, in fact, the one thing that ultimately matters. As we read in paragraph 760 of the *Catechism of the Catholic Church*:

Christians of the first centuries said, "The world was created for the sake of the Church." [*Pastor Hermae*, Vision 2, 4, 1: PG 2, 899; cf. Aristides, *Apol.* 16, 6; St Justine, *Apol.* 2, 7: PG 6, 456; Tertullian, *Apol.* 31, 3; 32, 1: PL 1, 508-509.] God created the world for the sake of communion with his divine life, a communion brought about by the "convocation" of men in Christ, and this "convocation" is the Church. The Church is the goal of all things, [Cf. St. Epiphanius, *Panarion* 1, 1, 5: PG 41, 181C.] and God permitted such painful upheavals as the angels' fall and man's sin only as

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<sup>4</sup> Second Vatican Ecumenical Council, *Declaration on Religious Liberty, Dignitatis Humanae* No. 10 (1965) (citations omitted). Unless otherwise noted, all translations of Vatican documents are from the versions found on the Holy See's website.

occasions and means for displaying all the power of his arm and the whole measure of the love he wanted to give the world:

Just as God's will is creation and is called "the world," so his intention is the salvation of men, and it is called "the Church." [Clement of Alexandria, *Paed.* 1, 6, 27: PG 8, 281.]

Creation was for the sake of the Church, and the Church is the mystical body of Christ. In the words of Henri Cardinal De Lubac: "If Christ is the sacrament of God, the Church is for us the sacrament of Christ; she represents him, in the full and ancient meaning of the term; she really makes him present. She not only carries on his work, but she is his very continuation . . . ."<sup>5</sup> The head of the Mystical Body is Christ Himself, the King of the Universe, whose antecedent will is that all be saved by incorporation into His mystical body.<sup>6</sup> The way out of the cul-de-sac of "religious liberty" is Christ-continued-in-the-world.

This truth has, and should have, literally cosmic consequences -- an eventuality that its indefatigable opponents are ever poised to defeat. These opponents' strategies for inflicting defeat include both individual manoeuvres and, moreover, systemic orderings, including at the level of constitutional law. It is too

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<sup>5</sup> Henri De Lubac, *Catholicism: Christ and the Common Destiny of Man* 76 (San Francisco: Ignatius Press, 1988). Trans. Lancelot C. Sheppard and Sister Elizabeth Englund, O.C.D. Original ed. 1947.

<sup>6</sup> On the theology of the mystical body of Christ, see Emile Mersch S.J., *The Whole Christ: The Historical Development of the Doctrine of the Mystical Body in Scripture and Tradition* (Eugene, Oregon: WIPF & Stock, 2011), espec. 556-73. Trans. John R. Kelly, S.J. Original ed. 1938.

little noticed that the United States' juridical order has the effect, if not also the purpose, of hobbling – indeed, eliding -- the Church. What the enthusiasts of our First Amendment's so-called "religion clauses" must answer for is that that "article of peace," as it is sometimes called with approbation, does not so much as recognize, as a matter of constitutional law, the Church *per se*. To be sure, individuals enjoy constitutional rights to the "free exercise of religion," but the Constitution does not cognize the Church *as such* as a rights-bearing reality. What room to operate the Church is afforded *as a matter of constitutional law* is of a piece with what liberty the Boy Scouts enjoy, that is, the (contingent) right of any old group to associate.<sup>7</sup> And, furthermore, what liberty the Church enjoys *as a matter of sub-constitutional law* is, as a practical matter, a function of the largely unprincipled contingencies of our tax code and, specifically, what the Internal Revenue Service determines will "count" as a 501c(3) entity under Section 26 of the United States Code.

This situation seems not to trouble many contemporary Catholics, who are functionally Congregationalists. To the extent they give the matter any thought at all, they are contented by the Constitution's agnosticism concerning the Church, in part because they habitually think of the Church on the model of a club or some other mere voluntary association, not as a perfect society, indeed, the very purpose of creation itself. Having read (or at least imbibed) their Locke, who would tolerate everyone *except* "Papists and fanatics,"<sup>8</sup> they are just grateful to be tolerated and

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<sup>7</sup> Boy Scouts of America v. Dale, 530 U.S. 640 (2000) ("expressive association"). See Richard Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?," 22 *St. John's Journal of Legal Commentary* (2007).

<sup>8</sup> John Locke, *A Letter Concerning Toleration* (Hackett Publishing Co, 1983), 17. Ed. James H. Tully.



accommodated. Indeed, they are deaf and blind to the perversity in their being obliged (and obligated) to say “pretty please” when they are emboldened to petition the government officials, whose salaries they pay, merely to accommodate their ways of living *qua* Church. And, my further point is that they are oblivious to how their accommodation-strategy amounts to collusion in arranging a social and legal order out of conformity with the moral law. Under the influence of the godless premises that underlie the Constitution itself, they have given up trying to correct and transform *the world* to reflect the reality of the Church and what she teaches. Lobbyists for the status quo are around every corner and at every bus stop, and many Catholics – the ones who are always saying that the Church should “stay out of politics” and should “let people decide for themselves” – are among the greatest lovers of the way things are. Catholics should know better than to leave this world to own pathetic devices. Catholics must reject the normativity of the status quo and refuse to grovel before the Zeitgeist.

The Catholic position on which I proceed is this: law must be on the side of reality, and not just, except as a last resort, by way of the regulatory largesse called “accommodation.” The reality is that salvation history is not a tragedy, even if some would like us to ignore Christ’s victory and embrace as humanity’s best-hope a tragic mode of living.<sup>9</sup> Catholic theology teaches that creation was for the sake for the Church, and Catholic theology also teaches that the “aim” of the Church “is the realization of the kingdom of God not only within its own organization but in the

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<sup>9</sup> E.g., Marc DeGirolami, *The Tragedy of Religious Freedom* (Cambridge: Harvard University Press, 2013).

whole of human society and not only in the after life but also in this life.”<sup>10</sup> This realization can occur, as Bernard Lonergan further explains, “only when theology unites itself with all other relevant branches of human studies.”<sup>11</sup> Theology must teach law and shape law, else law will impede nothing short of the very purpose of creation. Unless the juridical order is structured by the Church’s own self-understanding, it cannot but thwart the reason for its own – and all of creation’s -- existence. The foundational point is that the divinely *given* constitution of the Church must shape the *contingent* constitution of the state, not the other way around.

But how? Not by merely protecting “religious freedom.” In the terms in which it is much advocated today, “religious freedom” involves a defeating and even deadly distraction from the very purpose of creation itself, the Church.<sup>12</sup> The Church first, only then the issues revolving around toleration of the practice of false religions and so forth.

I am not naïve. We cannot anticipate that our culture will soon comprehend, let alone honor, claims on behalf of the Church. The transcendent point, however, is that it would be a false denial of human freedom itself to treat the destruction and declension that individual and collective human agency began five-hundred years ago, and later entrenched in the First Amendment to the U.S. Constitution, as

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<sup>10</sup> Bernard J.F. Lonergan, *Method in Theology* (Minneapolis: Winston Press, 1979), 363-64. Original edition 1972.

<sup>11</sup> Lonergan, *Method in Theology*, 364

<sup>12</sup> A partly complementary account is Steven Smith, “Freedom of Religion or Freedom of the Church?”, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412)

inevitable or irreversible.<sup>13</sup> We cannot give up fighting. We need not be impotent because our forebears failed. We need not self-fulfill the false prophecy of historical tragedy. Instead, we need to make exactly the arguments that the agents of the grand coalition in favor of the status quo tell us not to bother making.<sup>14</sup> And we need, moreover, to use not just reasoned arguments but also the very tool that those same agents are keenest to marginalize: the grace of the supernatural. The advertisement of the prospect of a completely natural “solution” to our human situation popularizes a pernicious Enlightenment myth that is destined to disappoint.

In order to resist the ubiquitous heresy that the Popes have condemned under the name “naturalism,” we Catholics must insist on what Cardinal Pie of Poitiers recognized as the “primacy of the supernatural.”<sup>15</sup> Also in the words of

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<sup>13</sup> For the history, see Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge: Harvard University Press, 2012).

<sup>14</sup> I owe the “grand coalition for the status quo” expression to John Rao. See his *Black Legends and the Light of the World: The War of Words with the Incarnate Word* (Forest Lake, MN: Remnant Press, 2011).

<sup>15</sup> Quoted in Joseph F.X. Sladky, “Cardinal Pie and the Social Kingship of Christ,” *Crisis Magazine*, May 16, 2013. Almost none of Cardinal Pie’s many writings has been translated from French into English, but there is a pamphlet, “Selected Writings of Cardinal Pie of Poitiers” (Catholic Action Resource Center, 2007), that contains key passages. On the error and heresy of naturalism, see Pope Leo XIII, encyclical letter *Humanum Genus* (1884) No. 12: “Now, the fundamental doctrine of the naturalists, which they sufficiently make known by their very name, is that human nature and human reason ought in all things to be mistress and guide. Laying this down, they care little for duties to God, or pervert them by erroneous and vague opinions. For they deny that anything has been taught by God; they allow no dogma of religion or truth which cannot be understood by the human intelligence, nor any teacher who ought to be believed by reason of his authority. And since it is the special and exclusive duty of the Catholic Church fully to set forth in words truths divinely received, to teach, besides other divine helps to salvation, the authority of

Cardinal Pie: “Jesus Christ is not optional,”<sup>16</sup> and because His mystical body is the Church, the Church is not optional. It comes down to this: if we believe that creation itself was for the sake of the Church, we can hardly make “religious freedom” the ideal. We may well need to tolerate, for now, it as the best available *modus vivendi*, but it would be apostasy to renounce the ideal: the reign of Christ over all and the incorporation of all into his mystical body. Christ came to bring salvation, not endless toleration.

### III.

Working from the judgment that law must be shaped by correct theology (which is by no means to claim that law must necessarily prohibit all moral vices), we can take as our proximate theological starting point *Dignitatis humanae*. One of the Second Vatican Ecumenical Council’s most important documents, it was promulgated, under the authority of Pope Paul VI, following a vote of the Council Fathers, 2,308 in favor and 70 opposed, thus receiving more *Non placet* votes than any other Council document. *Dignitatis*’s main theme, the right of the human person to “religious freedom” – that is, roughly, of his liberty to practice his chosen religion -- hardly requires further introduction, even as the term awaits the specification and delimitation that will be provided in Section VI. The *Declaration*’s sonorous phrases

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its office, and to defend the same with perfect purity, it is against the Church that the rage and attack of the enemies are principally directed.”

<sup>16</sup> Quoted in Sladky, “Cardinal Pie and the Social Kingship of Christ.”

in praise of religious freedom or “liberty of conscience” -- so long as the “public order” is preserved -- have been almost universally celebrated ever since they were declared, even as the meaning of “public order” has been debated and, as we shall see, authoritatively clarified and corrected.

*Dignitatis*’s declaration of the right to “religious freedom” delivered nothing short of a shocking surprise. Prior to the Council, there was among Catholic theologians what Judge John T. Noonan, Jr., has fairly described as “unanimity” against the possibility of such a thing. “[The theologians] were united,” Noonan explains, “because they followed what [Pope] Gregory XVI had taught in *Mirari vos*, what Pius IX, following Gregory XVI, had taught in *Quanta cura*, what Leo XIII in the wake of his predecessors had proclaimed in *Immortale Dei*.”<sup>17</sup> What Gregory had declared that had been followed is this *in nucleo*: “From [the] most foul fruit of indifferentism flows that absurd and erroneous opinion, or, rather, madness, that freedom of conscience must be affirmed for everyone.”<sup>18</sup> “*Deliramentum*,” madness, is what Gregory XVI and, echoing him, Pius IX judged liberty of conscience to be.<sup>19</sup>

The attention devoted since 1965 to what *Dignitatis* declared on behalf of what recent Popes had only recently regarded as nothing short of insanity or madness is, I think, no less than is merited. It has, however, tended to occlude the most important element of the interpretive context in which *Dignitatis* declared it.

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<sup>17</sup> John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley: University of California Press, 1997), 27.

<sup>18</sup> Pope Gregory XVI, encyclical letter *Mirari vos* (1832) No. 14, quoted in Noonan, *The Lustre of Our Country*, 27.

<sup>19</sup> Noonan, *The Lustre of Our Country*, 360. “*Deliramentum*, meaning ‘madness,’ is the term used by both Gregory XVI and Pius IX. It is sometimes softened by being translated ‘aberration’; but ‘madness’ is what Gregory XVI chose to call liberty of conscience; and Pius IX repeated the term.” *Ibid.*

The rarely discussed Section 1 of *Dignitatis* undertakes, in terms, authoritatively to establish what the *Declaration on Religious Liberty* is about and, correlatively, what it is *not* about. Section 1 reads in relevant part as follows: “Religious freedom, . . . which men demand as necessary to fulfill their duty to worship God, has to do with immunity from coercion in civil society. Therefore *it leaves untouched [integram relinquit] traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ.*”<sup>20</sup> By its own explicit declaration, then, the *Dignitatis* emphatically refuses to attempt a fresh statement concerning the relationship between Church and state. The Declaration does not attempt to develop doctrine on this issue; it specifically reaffirms “traditional” Catholic doctrine on the duties of men “and societies” – political society not exempted -- toward the Church. Any reasonable doubt about this is eliminated when one recalls that those two words – “traditional” and “societies” – were adopted late in the drafting process because alternative formulations received too few votes.<sup>21</sup> The key section of the *Relatio* by Bishop DeSmedt makes clear that the changes worked by those two words were intended to reaffirm, in particular, the moral duty of the state to recognize the unique truth of the Catholic religion.<sup>22</sup>

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<sup>20</sup> Emphasis added.

<sup>21</sup> The relevant portion of the immediately preceding *Textus recognitus* stated: “Moreover this treatment of religious liberty leaves intact the Catholic doctrine concerning the one true religion, the one Church of Christ, and the moral duty of men towards the Church.” As Michael Davies explains, “[t]his compromise did not work, and the vote indicated that 28% of the Fathers were still partly or wholly unsatisfied – a minority too large to be ignored. . . . The final text . . . is definitely much stronger due to the addition of the words *traditional* and *societies*.” Michael Davies, *The Second Vatican Council and Religious Liberty* (Long Prairie, MN: Neumann Press, 1992), 171.

<sup>22</sup> Davies, *The Second Vatican Council and Religious Liberty*, 171.

This language of Section 1 reaffirming the “traditional Catholic doctrine” provides, in turn, the context in which to interpret the following important passage in *Dignitatis* Section 6:

If, in view of peculiar circumstances obtaining among certain peoples, special legal recognition is given in the constitutional order of society to one religious body, it is at the same time imperative that the right of all citizens and religious bodies to religious freedom should be recognized and made effective in practice.<sup>23</sup>

Some have argued that this conspicuously circumscribed, or even tortured, acknowledgment of the legitimacy of what in English we refer to as “establishment” of religion should be read as creating an authoritative *exception* to the “traditional Catholic doctrine” affirmed in Sec. 1 and said there to be left “untouched,” according to which establishment of the Catholic religion was the norm, indeed the ideal, in a Catholic society. In other words, some claim that Sec. 6 works a renunciation of the Church’s traditional claim to a right, in a Catholic society, to be the religion of the state.

Worthy of special note, on this question of the effect of Sec. 6, is what Father Joseph Ratzinger wrote in 1966 in his book *Theological Highlights of Vatican II*:

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<sup>23</sup> As translated in Walter M. Abbott, S.J. (ed), *The Documents of Vatican II in a New and Definitive Translation* (New York: Herder and Herder, 1966), 685.

Most controversial was the third newly emphasized aspect. The text *attempts* to emphasize a continuity in the statements of the official Church on this issue. It also says that it “leaves intact the traditional Catholic doctrine on the moral duty of men and communities toward the one true religion and the only Church of Christ.” The term “duty” here has doubtful application to communities in their relation to the Church. Later on in the Declaration, the text itself *corrects* and *modifies* these earlier statements, offering something new, something that is *quite different* from what is found, for example, in the statements of Pius XI and Pius XII. It would have been better to omit these *compromising formulas* or to reform them with the latter text. The introduction (Article 1) changes nothing in the text’s content; therefore, we need not regard it as anything more than a minor flaw.<sup>24</sup>

The brilliant young priest who would later reign as Pope Benedict XVI was present at the Council and active there as a *peritus*, so it is surprising for him to judge mistakenly that the text of Sec. 1 that was added at the last minute was “corrected” by the *preexisting* language of Sec. 6. In any event, in 1989 then-Cardinal Ratzinger stated that he no longer held the view that Sec. 6 of the enacted text “corrects” Sec. 1.<sup>25</sup>

Ratzinger’s change of mind was all to the good, I would suggest, but it hardly resolves the decisive issue. That issue, of course, is the meaning of the text

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<sup>24</sup> Joseph Ratzinger, *Theological Highlights of Vatican II* (New York: Paulist Press, 2009), 211-12. (emphasis supplied). Original edition 1966.

<sup>25</sup> Davies, *The Second Vatican Council and Religious Liberty*, 205.



identified by a correct interpretation. But what, then, is the meaning of *Dignitatis* on this question? Commenting on Sec. 1, Russell Hittinger has observed that “[i]t might prove surprising, if not frustrating, that [*Dignitatis*] puts to one side theoretical treatment of the issues that directly touch, in American terms, upon the establishment of religion. . . . A reader might reasonably say,” Hittinger continues:

[a]fter all these centuries of church and society constituting a kind of *corpus mysticum*, and after all the various and sundry establishments of religion, it hardly seems possible that the “official” reckoning with this history would be reduced to the disclaimer in Sec. 1, regarding what the Council leaves untouched, and the rather terse sentence of Sec. 6 on the need for the state to respect the rights of minorities in situations where the Church is privileged in the constitution. The correct response is that it is not possible because [*Dignitatis*] does not undertake such a reckoning. For the Second Vatican Council it was quite enough to tackle the problem of the religious civil liberties of individuals, communities, and the Church Herself.<sup>26</sup>

I agree with Hittinger that the best available interpretation of the text must acknowledge that by its own terms *Dignitatis* unequivocally leaves “untouched” or “intact” (“*integram relinquit*”) the traditional Catholic doctrine on, among related topics, civil society’s – or the state’s -- duty toward the Church. One may regret this, and one may even note, correctly, that so-called “traditionalists” called for the Sec. 1

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<sup>26</sup> Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, DE: ISI Books, 2003), 224-25.

explicit concession regarding what the *Declaration* did not do. An honest and docile reading of the document, however, must reflect what it acknowledges as its intended silences. “The beginning of wisdom in reading [*Dignitatis*] is to respect its silences,”<sup>27</sup> as Hittinger has observed. I will return to this below.

Before proceeding, however, one final cautionary comment on the current state of the hermeneutics of *Dignitatis* is in order. The document is, in my view, ambiguous, at least in some respects (though not in others) on the pivotal questions under discussion here, and intentionally so. In fact, on the very pages of *L'Osservatore Romano*, Walter Cardinal Kasper, emphatically not a traditionalist, recently insisted up as much, including that the ambiguities were part of an intentional program, what Michael Davies had earlier referred to as “time bombs.”<sup>28</sup> More recently still, Bishop Athanasius Schneider of Kazakhstan has called for an authoritative clarification of the documents of Vatican II by the Holy See, and I applaud his call, recognizing, with all due respect, that Pope Francis is an unlikely source for the much-needed theological precision.<sup>29</sup> In any event, until such time as the ambiguities are removed, they will continue to wreak havoc in the life of the Church, inevitably generating conflict on issues on which there should be Catholic unity. Meanwhile, for the reasons I have already adduced, I consider the sounder interpretation of *Dignitatis* to be that it leaves traditional doctrine untouched on the duties of societies toward the true religion and the one Church of Christ, while at the

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<sup>27</sup> Hittinger, *First Grace*, 238.

<sup>28</sup> <http://unamsanctamcatholicam.blogspot.com/2013/04/kasper-admits-intentional-ambiguity.html>.

<sup>29</sup> <http://unamsanctamcatholicam.blogspot.com/2013/07/athanasius-schneider-clarification-of.html>

same tracing out perhaps necessary prudential considerations for the peculiarly modern and unfortunate social circumstances in which Catholics are in a minority.<sup>30</sup>

#### IV.

Among those who sometimes refused to acknowledge *Dignitatis*'s ambiguities and silences for what they were and were, indeed, intended to be, we must number Father John Courtney Murray, S.J. Murray's interpretation of Sec. 6, and in particular his prestigious refusal to respect *Dignitatis*'s silence on the question of "establishment," has influenced many persons' interpretation of the document. Murray avers as follows in his commentary in the Abbot edition of the documents of Vatican II: "This paragraph is carefully phrased. The Council did not wish to condemn the institution of 'establishment,' the notion of a religion of the state.' A respectable opinion maintains that the institution is compatible with full religious freedom."<sup>31</sup> "On the other hand," however, Murray continued in the same breath:

[t]he Council did not wish to canonize the institution. A respectable opinion holds that establishment is always a threat to religious freedom.

Furthermore, the Council wished to insinuate that establishment, at least from the Catholic point of view, is a matter of historical circumstance, not of

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<sup>30</sup> See the contributions of Brian Harrison in Arnold T. Guminski and Brian W. Harrison, O.S., *Religious Freedom: Did Vatican II Contradict Traditional Catholic Doctrine? A Debate* (South Bend, IN: St. Augustine's Press, 2013).

<sup>31</sup> Abbot, *The Documents of Vatican II*, 685 n.17.

theological doctrine. For all these reasons the text deals with the issue in conditional terms.<sup>32</sup>

Especially given Murray's somewhat balanced report of Sec. 6's cultured equipoise on the issue of establishment, it is astonishing to have to confront the man's personal view, expressed elsewhere *in the same year* (1966), that *Dignitatis* withholds all preferential treatment, including any form of establishment, from the Church.<sup>33</sup> The bottom line is that, flirting with (or violating) the principle of non-contradiction, Murray held at the same time mutually contradictory positions on what *Dignitatis* accomplished, but it was Murray's personal view, however, according to which *Dignitatis* condemned all establishment, that got by far the greater traction and circulation. The counter-Magisterium at work.

The Murray-encouraged myth that *Dignitatis* does work that it deliberately declined enjoys distinguished defenders, including Judge Noonan himself. On Noonan's account, it was the genius of the American constitutional devotion to "religious freedom" that, through the work of Fr. Murray (and others) at the Second Vatican Council, carried the day with the Council Fathers and led to *Dignitatis*. Each point merits emphasis. First, according to Noonan, "[t]he learning [at the Council] had been largely from the United States . . . [T]he Declaration on Religious Freedom would not have come into existence without the American contribution and the

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<sup>32</sup> Ibid.

<sup>33</sup> John Courtney Murray, "The Issue of Church and State at Vatican II," *Theological Studies* 27 (1966), reprinted in *Religious Liberty: Catholic Struggles with Pluralism*, ed. J. Leon Hooper (Louisville, Ky.: Westminster/John Knox Press, 1993), 207, 212, 210.

experiment that began with Madison.”<sup>34</sup> Second, according to Noonan, “[l]ike religion itself free exercise is culture-bound. Yet there is a direction in which the nations have moved. The American experience has lighted up the skies.”<sup>35</sup>

We can agree with Noonan that the United States constitutional order has done a fabled job of protecting individual religious freedom through law; that juridical accomplishment has been, in Noonan’s view, “the lustre of our country” (a phrase he borrows from James Madison).<sup>36</sup> But there is also the competing fact that our culture and constitutional jurisprudence have not done a correspondingly good job -- not by a long shot -- of honoring the liberty of the Church, *libertas Ecclesiae*, through law. It is illustrative that the *libertas Ecclesiae*, on which *Dignitatis* is quite loquacious (as we shall see), does not so much as surface in Noonan’s book *The Lustre of Our Country*. This omission inexorably means that the question of “religion” was settled in Noonan’s analysis, at least by way of exposition, without reference to the very purpose of creation. How can such an occlusion “light[] up the skies”?, one might reasonably ask. It is no exaggeration to say that, on Noonan’s telling, the constitutional order of the United States is commended without regard to its capacity or its incapacity to facilitate the life of the mystical body of Christ and of the incorporation of individuals into the life of His mystical body.

If Noonan is correct concerning the commitments deployed in our constitutional order, there should be no surprise over the Obama Administration’s current crusade to compel the Church to violate the moral law as a condition of her

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<sup>34</sup> Id. at 353

<sup>35</sup> Id. at 9.

<sup>36</sup> Id. at 4.

continuing to perform her corporal and corporate works of mercy and justice. If we were to coin a phrase to parallel Madison's as echoed by Noonan, we might call this "the indictment of our country."<sup>37</sup> After all, the Church is no essential component -- only an accidental, incidental, and contingent component -- of the skies Noonan considered "lighted up." The constitutional reduction of the matter of religion, a matter of divine justice, to individuals' claimed rights to "religious freedom," reduces the rights of the Church to rubble in need of resuscitation, on a good day. This evisceration should trouble Catholics to their core.

## V.

The adequate alternative to this injustice would consist, in the first place, of giving the Church what is hers by divine right, as *Dignitatis* itself teaches. *Dignitatis*, having affirmed that "the traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ" remains intact, re-states the core of that doctrine as follows:

Among the things that concern the good of the Church and indeed the welfare of society here on earth-things therefore that are always and everywhere to

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<sup>37</sup> Having criticized Noonan's *The Lustre of Our Country* for following Murray's personal thesis on the *libertas Ecclesiae* that the text of *Dignitatis* does not, I think, support, fairness and great respect require me to add that I was honored to work as a research assistant on parts of that book and later reviewed the book in very favorable terms. I will take this occasion to regret my own slowness to appreciate the priority of the *libertas Ecclesiae*, while at the same time reiterating my debt to Judge Noonan for his edifying insistence that the Catholic Church must never compel non-Catholics to become Catholic.

be kept secure and defended against all injury-this certainly is preeminent, namely, that the Church should enjoy that full measure of freedom which her care for the salvation of men requires. This is a sacred freedom, because the only-begotten Son endowed with it the Church which He purchased with His blood. Indeed it is so much the property of the Church that to act against it is to act against the will of God. The freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.<sup>38</sup>

What *exactly* the *libertas Ecclesiae* consists in remains to be stated, and *Dignitatis* itself does indeed speak to this very issue, though with a critical omission to which I shall come toward the end. Whatever the details, however, it is undeniable that *Dignitatis* privileges that principle's significance and scope: "*Libertas Ecclesiae est principium fundamentale in relationibus inter Ecclesiam et potestates publicas totumque ordinem civilem.*" *Dignitatis* thus teaches, consistently with the whole of Catholic tradition, that specification of what is the Church's by right does not await definition or concession by the civil ruling authority but instead precedes it as "*principium fundamentale.*" This freedom is "sacred" ("*libertas sacra est*") because it is endowed by Christ. "The Church's 'sacred liberty' stems from divine mandate directly, rather than via secondary causality. . . . [It] cannot be unseated by

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<sup>38</sup> *Dignitatis* No. 13 (footnote omitted).

considerations of ‘prudence,’ whether those considerations be introduced by the Church or by the state,”<sup>39</sup> not even by “Framers” or the Obama Administration.

The liberty of the Church comes *first*. As *Dignitatis* reaffirms, the freedom of the Church is “*principium fundamentale*” that all must honor. The liberty of the Church, not individual “religious freedom is the fundamental principle in determining relations between the Church and the civil authorities. If the liberty of the Church is to be honored, however, that liberty “must be established [“*sancienda*”] in the juridical order,” to quote the words of *Dignitatis* itself.<sup>40</sup> Without such freedom fixed firmly in law, Christians cannot but drift -- or be driven -- into diaspora. What is at stake is the life of the Mystical Body of Christ, not just the vibrancy of scouting.

James Madison, one of the heroes of Noonan’s book, knows nothing of the liberty of the Church; individual conscience is as much as he knows. Fr. Murray, another of the book’s heroes, knows both, of course. As Frederick Lawrence has written, “Murray’s thought on politics is colored by the unfolding tradition of Christian constitutionalism in virtue of the historical mediation – at once theological, ethical, political, juridical, and jurisprudential – of the principle of the two swords and the principle of *libertas ecclesiae*.”<sup>41</sup> In *We Hold These Truths*, Murray explained that “the whole patristic and medieval tradition, which Leo XIII

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<sup>39</sup> Hittinger, *First Grace*, 233.

<sup>40</sup> *Dignitatis*, No. 13: “Concordia igitur viget inter libertatem Ecclesiae et libertatem illam religiosam, quae omnibus hominibus et communitatibus est tanquam ius agnoscenda et in ordinatione iuridica sancienda.”

<sup>41</sup> Frederick G. Lawrence, “John Courtney Murray and Political Theology as Conversational,” in J. Leon Hooper, S.J., and Todd David Whitmore (eds), *John Courtney Murray and the Growth of Tradition* (Kansas City, MO: Sheed and Ward, 1996), 41, 44.



reiterated to the modern world, asserts the freedom of the Church to be a participation in the Incarnate Son of God, the God-Man, Christ Jesus. . . . I should perhaps emphasize,” Murray continued, “that the phrase [*libertas Ecclesiae*] should be given its full meaning. . . . What appeared within history was not an ‘idea’ or an ‘essence’ but an existence, a Thing, a visible institution that occupied ground in this world at the same time that it asserted an astounding new freedom on a title not of this world.” Murray is acutely aware that the world did not spontaneously acquiesce in what the Church claimed for herself and accede to the limit she placed on the state:

Through the centuries a new tradition of politics was wrought out very largely in the course of the wrestlings between the new freedom of the Church and the pretensions of an older power which kept discovering, to its frequent chagrin, that it was not the one unchallengeable ruler of the world and that its rule was not unlimitedly free.<sup>42</sup>

Would that such “discovering” were the end of the story, but Murray himself was also acutely aware that the next phase of the long arc of salvation history involved a root and branch rejection of what had gradually been discovered as the implications of the *libertas Ecclesiae*.

In the period Murray was describing in the language quoted above, “[t]he freedom of the Church, in its pregnant meaning, was conceived to be the key to the

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<sup>42</sup> John Courtney Murray, *We Hold These Truths : Catholic Reflections on the American Proposition* (Kansas City, MO: Sheed and Ward, 1960), 202, 204.

Christian order of society.”<sup>43</sup> It is customary and convenient to describe the organizing principle of the Christian order of society as the “Gelasian dyarchy,” a reference to Pope Gelasius I’s declaration to the Emperor Anastasius:

There are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment. You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation. In the reception and proper disposition of the heavenly mysteries you recognize that you should be subordinate rather than superior to the religious order, and that in these matters you depend on their judgment rather than wish to force them to follow your will.<sup>44</sup>

According to Murray, the defining feature of what he refers to as “modern politics”<sup>45</sup> was the rejection of the theorem of the Gelasian dyarchy. “The freedom of the Church, again in its pregnant sense, was discarded as the mediating principle between society and state . . . . Instead, a secular substitute was adopted in the form

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<sup>43</sup> Id. at 205.

<sup>44</sup> <http://www.fordham.edu/halsall/source/gelasius1.asp>

<sup>45</sup> Murray, *We Hold These Truths*, 205.

of free political institutions. Through these secular institutions the people would limit the power of government.”<sup>46</sup> The Church herself was supplanted in favor of the contingent deliveries of individual conscience. This is the regime Murray *defends*, the one Noonan *celebrates* as having been baptized by *Dignitatis*. “The key to the whole new political edifice,” Murray explains, “was the freedom of the individual conscience. Here precisely lies the newness of the modern experiment. . . . The only sovereign spiritual authority would be the conscience of the free man.” Murray is unstinting in his description of the revolution wrought by the politics of modernity:

The freedom of the individual conscience, constitutionally guaranteed, would supply the armature of immunity to the sacred order, which now became, by modern definition, precisely the order of private conscience. And through free political institutions, again constitutionally guaranteed, the moral consensus of the community would be mobilized in favor of justice and freedom in the secular order.<sup>47</sup>

Such was the promise of a political order out of which had been wrung the *libertas Ecclesiae*. And it required, as Murray notes, “a great act of trust.”<sup>48</sup> But, one might reasonably ask, why trust the consciences of the neighbors more than the Church?

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<sup>46</sup> Id. at 206

<sup>47</sup> Id. at 206.

<sup>48</sup> Ibid.

Murray did not live long enough to write his own variation on the disillusionment and disappointment Jacques Maritain poured out in *The Peasant of the Garonne*, and so we can only speculate about what Murray's judgment would have been concerning how the intended fruits of the "great act of trust" are working out. One can marshal passages from *We Hold These Truths* that reveal commendable if inchoate anxiety on Murray's part about whether post-modern man and his conscience – and that would be us! -- can make the experiment work. But even after the Council, as I mentioned above, Murray was keen to renounce what *Dignitatis* itself refused to renounce: all juridical privileges for the Church.

Murray had his reasons, of a sort, and they are dominant today. Murray was inebriated with a politico-theoretical naivette that plagues Anglo-Americans descended intellectually from Thomas Hobbes and his "mortal God" Leviathan. A sober assessment of the contemporary situation requires acknowledging, as a first step, that Murray did not adequately reckon with the consequences of the extent to which Anglo-American liberalism breaks with the classical tradition of natural right and natural law. "Murray never acknowledged that Locke did not basically disagree with Hobbes's 'artificial law of nature.' He did not recover," as Lawrence explains, "virtue instead of power as the publicly relevant chief concern of political theory. Instead he moderated Hobbes's bottom line of self-preservation into comfortable self-preservation."<sup>49</sup> The result, as Lawrence goes on to explain, is that

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<sup>49</sup> Lawrence, "John Courtney Murray," 49.

[t]he common good and values not able to be ‘costed out’ get eliminated from the sphere of public discourse and public opinion. This de facto privatization of Christian values may just be left obscured, albeit unintentionally, by Murray’s famous distinction between public order as the domain of legitimately exercised political power and the common good as the domain of public consensus and of social concern beyond the limits of public order.<sup>50</sup>

We will return to that distinction below. The present point is that liberalism of the sort Murray asked us to “trust” systemically eliminates higher goals from politics in order to secure enough agreement to live peacefully together. More specifically, though Lawrence does not make the point explicitly, the liberal constitutional order descended from Locke denies the *libertas Ecclesiae*, the *right* of the Church, for example, to teach such illiberal ideas as the primacy of the common good, indeed of the supernatural common good and, moreover, to declare laws in conflict with those goods to be void. The U.S. Constitution simply does not acknowledge the divine right, let alone honor it.

Even as we limp along under a Lockean constitutional order, however, Christians know that God calls individuals and societies to a life richer than even an abundance of bourgeoisie Lockeanism. In this light, the question to which I would now like to turn is the one with which Fred Lawrence concluded his study of “Murray and the Ambiguities of Liberalism:” “Is the correction and sublation of liberal constitutionalism by Christian constitutionalism, in a way that Murray

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<sup>50</sup> Id. at 50.

initiated but was unable to finish during his lifetime, possible?” Or, to vary the question slightly, is Christian constitutionalism possible anymore? And in what would it consist?

## VI.

The articulation and implementation of the *libertas Ecclesiae* do not occur except in lived history, of course, and the study of history discloses that the position of the Church in the world has varied by time and place. Some configurations are better than others, but *Dignitatis* leaves no doubt but that all must be judged according to that “*principium fundamentale*” that is *sacra libertas Ecclesiae*. To repeat: the *contingent* constitution of the state must be in conformity with the *given* constitution of the Church, not the other way around.

But what, then, about individuals and their rights? For nearly fifty years now, *Dignitatis* has been praised for being the Church’s conversion to the “religious freedom” of individuals. In point of fact, however, the traditional Catholic view authoritatively taught the following three pro-individual-freedom principles:

1. No one must be forced to act against his conscience in private.
2. No one must be forced to act against his conscience in public.
3. No one must be forced to act against his conscience in public or in private, but may be forced to act against his conscience when the matter involves

a violation of the natural law and civil authorities determine that it would be in the interest of the common good to do so.<sup>51</sup>

These traditional principles represent the authoritative teaching of the Church, even if, alas, they were not always honored in practice.

The celebrated achievement of *Dignitatis* was to add a fourth principle to this list of three, and this addition is what earlier Popes had understood to amount to “*deliramentum*,” madness:

4. No one may be prevented from acting in accordance with his conscience in public, provided the “public order” is not violated.<sup>52</sup>

It is undisputed that the phrase “public order” that made its way into the text of *Dignitatis* was intended by Murray and others to encompass less than the scope of the common good as it was traditionally understood,<sup>53</sup> but the *Catechism of the Catholic Church* revisited the question and taught instead that

[t]he right to religious liberty can of itself be neither unlimited nor limited only by a “public order” conceived in a positivist or naturalist manner. The “due limits” which are inherent in it must be determined for each social

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<sup>51</sup> See Davies, *The Second Vatican Council*, 210-31.

<sup>52</sup> My account of these four principles varies that provided in Davies, *The Second Vatican Council*, 210-31.

<sup>53</sup> Id at 156-58.

situation by political prudence, according to the requirements of the common good . . . .<sup>54</sup>

In support of this gloss on *Dignitatis*, the *Catechism* cites Pius VI, *Quod aliquantum* (1791) and Pius IX, *Quanta cura* (1864). The continuity with the previous teaching is evident because demonstrated.

This affirmation of the civil ruling authority's ordination to the common good, not merely to an emaciated "public order," even in the face of individuals' conflicting claims to act according to conscience in public, should serve to focus our attention on the true connection between the liberty of the Church and the constitution of the state. On the one hand, the focal role of the civil ruling authority is to ordain the commonwealth to the temporal common good but also, as Blessed John XXIII made clear in his celebrated encyclical letter *Pacem in terris* (1963), to the supernatural common good:

In this connection, We would draw the attention of Our own sons to the fact that the common good is something which affects the needs of the whole man, body and soul. That, then, is the sort of good which rulers of States must take suitable measure to ensure. They must respect the hierarchy of values, and aim at achieving the spiritual as well as the material prosperity of their subjects.<sup>55</sup>

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<sup>54</sup> *Catechism of the Catholic Church*, sec. 2109

<sup>55</sup> Blessed John XXIII, encyclical letter *Pacem in terris* (1963) No. 57 (citing Pope Pius XII, encyclical letter *Summi pontificatus* (1939)).



*Dignitatis* carefully refused to endorse state neutrality with respect to religion; instead, as Russell Hittinger's exegesis of *Dignitatis* demonstrates, "[g]overnment should actively promote, not usurp, religious acts."<sup>56</sup>

On the other hand, it is the work of the Church to ordain humanity to the supernatural common good, including sometimes by directing the terms of the temporal common good. No one has improved on Pope Leo XIII's statement of the architectonic structure of the relationship between Church and state:

The Almighty, therefore, has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there is, we may say, an orbit traced out within which the action of each is brought into play by its own native right. But, inasmuch as each of these two powers has authority over the same subjects, and as it might come to pass that one and the same thing-related differently, but still remaining one and the same thing-might belong to the jurisdiction and determination of both, therefore God, who foresees all things, and who is the author of these two powers, has marked out the course of each in right correlation to the other.<sup>57</sup>

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<sup>56</sup> Hittinger, *First Grace*, 230.

<sup>57</sup> Pope Leo XIII, encyclical letter *Immortale Dei* (1885) No. 13.

According to Leo later in the same encyclical, “[t]his is the teaching of the Catholic Church concerning the constitution and government of the State,”<sup>58</sup> and it was this teaching, in turn, that *Dignitatis* deliberately left “untouched.”

While Church and state each has its own sphere in which to work and govern, it bears emphasis that, *pace* modern political theory that seeks to legitimate all social structures exclusively on the ground of democratic pedigree, neither Church nor state performs its function on its own authority. Church and state are the same in having what authority they have *only from Christ*. The Church enjoys her authority directly by Christological establishment and the state possesses its own authority via designation by the people, but that difference in causality does not alter the fundamental fact that neither Church nor state stands on its own authoritative bottom. To be precise, the ruling authority of the state and the ruling authority of the Church are of a piece in this, viz., that they are participations in the Kingship of Christ.

## VII.

With this, then, we come to what I regard as the key to reversing the hopeless and ultimately pointless march in favor of “religious freedom”: the social Kingship of Christ. This is a doctrine of which one hears precious little since the Council; in fact, the conciliar and post-conciliar conspiracy of silence about the Kingship of Christ is deeply related to the Council’s preference for a state that is limited to

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<sup>58</sup> *Immortale Dei*, No. 36

preserving mere “public order.” Such a state could hardly be said to be a proper participant in the Kingship of Christ, for Christ ordains to the common good, not just to détente. Allowed and indeed obligated to ordain to the common good, however, as the *Catechism* teaches explicitly, the state manifests its participation in the regal *munus* of Christ.

Authoritatively taught by the Church for centuries, the doctrine of the social kingship of Christ was beautifully recapitulated by Pope Pius XI in his encyclical *Quas Primas* (1925) and, moreover, introduced into the *lex orandi* of the Church in a new Mass and Office for the last Sunday in October (in order immediately to precede the Feast of All Saints on November 1). While the Second Vatican Council was scandalously silent on the topic, on this doctrine, too, the *Catechism of the Catholic Church* refused to offer silence: “Christians are called to be the light of the world. Thus, the Church shows forth the kingship of Christ over all creation and in particular over human societies.” In support of this the *Catechism* cites *Apostolicam actuositatem*, the Council’s *Decree on the Laity* (1965), Pope Leo XIII’s *Immortale Dei* (1885), and Pope Pius XI’s *Quas primas* (1925). The citation to *Apostolicam actuositatem* would seem to be amiss because the text there says nothing in terms about the Kingship of Christ, but the citations to *Immortale Dei* and *Quas primas* transmit the traditional teaching concerning Christ’s social kingship.

*Dignitatis*, as I emphasized above, having declared that it left untouched traditional Catholic teaching on the duty of individuals and societies toward the one true religion and the Catholic Church, went on to declare that the “*principium fundamentale*” governing all relations between the Church and public authorities

and the whole civil order is the *libertas Ecclesiae*. To the extent that that proposition is true, however, it is so only if it be interpreted in light of traditional Catholic social teaching on which *Dignitatis* and the Council – but not the *Catechism* -- are regrettably silent, viz., the social Kingship of Christ. In language I quoted above, Murray aptly singled the Church out as a unique participation in the Incarnate Jesus. What Murray neglected to mention is the Church's participation – not to mention the state's different participation – in specifically the kingship, the royal *munus*, of the one Christ. If we speak more precisely and more fully than *Dignitatis* does, we must say that

[f]reedom is not *the* fundamental principle, nor *a* fundamental principle in the matter. The public law of the Church is founded on the States duty to recognize the social royalty of Our Lord Jesus Christ! The fundamental principle which governs the relations between Church and State is the “He must reign” of St. Paul, *Oportet illum regnare* (I Cor. 15:25) – the reign that applies not only to the Church but must be the foundation of the temporal City.<sup>59</sup>

## VIII.

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<sup>59</sup> Archbishop Marcel Lefebvre, quoted in Davies, *The Second Vatican Council*, 181.

In sum, although *Dignitatis* leaves untouched “traditional doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ,” the *Declaration* pregnantly and defiantly refuses to affirm the moral duty of societies toward Christ the King. This is, at best, a tension. It is little wonder, then, that in his message addressed to political rulers at the close of the Council, on December 8, 1965, Pope Paul VI could say this:

What does the Church ask of you today? In one of the major texts of the Council she has told you: she asks of you nothing but freedom – the freedom to believe and to preach her faith, the freedom to love God and to serve Him, the freedom to live and to bring to men her message of life.<sup>60</sup>

Commenting on this astonishing statement by the Sovereign Pontiff, Murray concluded:

This doctrine is traditional; it is also new. Implicit in it is the renunciation by the Church of a condition of legal privilege in society. The Church does not make, as a matter of right or of divine law, the claim that she should be established as the “religion of the state”. Her claim is freedom, nothing more.<sup>61</sup>

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<sup>60</sup> Abbott, *The Documents of Vatican II*, 693.

<sup>61</sup> Abbott, *The Documents of Vatican II*, 693.

The absurd consequences that follow from the “nothing more than freedom” position are on full display in Michael Novak’s novel social charter, to take one prominent example, in which “genuine” pluralism magically becomes the *grundnorm*:

In a genuine pluralistic society, there is no one sacred canopy. By intention there is not. At its spiritual core, there is an empty shrine. That shrine is left empty in the knowledge that no one word, image, or symbol is worthy of what all seek there. Its emptiness, therefore, represents the transcendence which is approached by free consciences from a virtually infinite number of directions. . . . Such an order calls forth not only a new theology but a new type of religion.<sup>62</sup>

I shall content myself with, first, the observation that Novak advocates “a new type of religion” on the ground that Christ is “unworthy” of what all seek and, second, the following question: Of whom is Christ unworthy? At Mass, Catholics pray (echoing the centurion of Matthew 8:8): “*Domine, non sum dignus, ut intres sub tectum meum, sed tantum dic verbo, et sanabitur anima mea.*” Novak has the order of reality backwards.

Mere freedom, with its empty shrine and new type of religion, is a false start and a dead end. As Pope Leo XIII stated in *Immortale Dei*, “there was a time when

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<sup>62</sup> Michael Novak, *The Spirit of Democratic Capitalism* (London: IEA, 1982, 1991), 53, 69.

states were ruled according the philosophy of the Gospels,”<sup>63</sup> and that was not, one might add, because states merely acknowledged the Church’s freedom but, instead, because states honored the demands of Christ’s social kingship as taught by the Church. The shrine was not empty and the only true religion was practiced by most in those states. The *true* common good demands no less.

Today, however, the U.S. Bishops oppose the contraceptive mandate solely on the stated ground that it violates the religious freedom of the Catholic Church, and Catholics galore are champing at the bit to reassure everyone who will listen that Catholic opposition to the mandate has nothing whatsoever to do with the moral law and contraception *per se*. This is all wrong, in my view, because the logic of such “it’s not about the moral law” arguments leads, at best, to a Church hunkered down in a bunker, left alone by and, in turn, *leaving alone the world it no longer seeks to correct and transform* according to the principles of the Gospel and – we must not overlook it – by the grace of the sacraments. Today, many self-styled liberals and neo-conservatives alike thrill to accuse the Church in the nineteenth century of being a “fortress” Church. Today, however, Timothy Cardinal Dolan protests only that the contraceptive mandate represents “government intrusion in the *internal governance* of religious institutions...” and violates “*our* standard for respecting religious liberty.”<sup>64</sup> In doing so, he ironically and unwittingly defends what amounts to a *fortress Church for the twenty-first century*, one within which Catholics will be permitted by legal accommodation to hide themselves from the evil that is

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<sup>63</sup> Pope Leo XIII, *Immortale Dei*, No. 12.

<sup>64</sup> See Patrick McKinley Brennan, “‘Religious Freedom,’ The Individual Mandate and Gifts: On Why the Church is Not a Bomb Shelter,” 58 *Villanova Law Review* 437, 450-52 (2013).

corrupting the rest of the world about which it no longer cares enough to give a damn. Will this evil receive no resistance from the Church Militant? Must not Christ reign?

Speaking in Milan on June 2, 2012, Pope Benedict stated that “to the extent that the concept of a confessional State is out of date, it seems in any case clear that its laws must find justification and force in natural law, which is the basis of an order in conformity with the dignity of the human person, surmounting a merely positivist understanding from which no ethical indication of any kind can be derived.”<sup>65</sup> This is the interpretation Fr. Ratzinger gave to *Dignitatis* but later-- though only temporarily, it would seem -- repudiated. It refuses on principle to aspire to a Christian constitutionalism, a state that honors its social obligations to Christ the King. It was a consistent theme of Pope Benedict’s pontificate that those who are responsible for advancing the work of the state through its laws must look beyond the mere facts about what has been posited as “law.” They must look, Pope Benedict taught, to the natural law or (as he liked to call them) “Christian values.” But must they not also look to Christianity itself and, indeed, to Christ, to Christ-continued-in-the world, the Church? First, the Church enjoys an ontological reality that involves rights, not just privileges. Second, Christ demands the social worship of a Catholic state, not just people’s implementation of some humanizing and

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<sup>65</sup> MEETING WITH GOVERNMENT AUTHORITIES ADDRESS OF HIS HOLINESS POPE BENEDICT XVI Hall of the Throne at the Archbishopric of Milan Saturday, 2 June 2012



civilizing “values” He seems to have inspired.<sup>66</sup> Third, the Church knows infinitely more reliably than the neighbors what the moral law requires.

Murray remitted our collective future and our individual futures to the “great act of trust” in a world of individual consciences perhaps formed according to natural law and natural right. This amounts to a hopeless refusal to allow the Church to function as is her right -- and as the world and souls *need*. The truly free Church will use her freedom and grace to break down the grand coalition in favor of the status quo, will wake souls from “Newton’s Sleep,”<sup>67</sup> and will correct and transform the world in the light of the New Law of the Gospel: the Church will “direct[] Christian service to human society to bring about the kingdom of God.”<sup>68</sup> Those Catholics who are up to this task, unlike so many self-describing Catholic liberals and neo-conservatives today, will apprehend the place of the supernatural in the “collaboration in fulfilling the redemptive and constructive roles of the Christian church in human society.”<sup>69</sup> Eager to perform the divinely commanded work of transformative service, the Church militant will not hunker down in a fortress, but instead will work through the organs of the Mystical Body of Christ for the correction and uplifting of all of society and culture, including through the

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<sup>66</sup> On Christ’s demand for the social worship of a Catholic state, see Alfredo Cardinal Ottaviani, *Duties of the Catholic State: Justice and Reason Forbid the State to be Godless* (Kansas City, MO: Angelus Press, 2009). Original edition 1954.

<sup>67</sup> I allude not so much to William Blake as to Joseph Vining, whose work in law offers a way out of the secularist cage that everywhere offers to imprison us. See Patrick McKinley Brennan, H. Jefferson Powell, and Jack L. Sammons (eds.), *Legal Affinities: Explorations in the Legal Form of Thought* (Durham, NC: Carolina Academic Press, 2013), a study of Vining’s work. On the importance of Vining’s work for waking us up, see also Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge: Harvard University Press, 2010), 40.

<sup>68</sup> Lonergan, *Method in Theology*, 362.

<sup>69</sup> Id. at 368.

constitutional and juridical order, even though its completion will not be achieved in a day.

The hour is overdue for men and women to awake from the dogmatic slumbers imposed by the grand coalition in favor of the status quo and recognize that the “empty shrine” enshrined by the U.S Constitution leads to a dead end, a tomb. Creation was for the sake of the Church, Christ-continued-in-the-world -- not for the sake of “religious freedom.” Christ is not optional. “*Oportet illum regnare*” (1 Cor. 15:25).

